

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

COMPANY PETITION NO.145 OF 2006

ICICI Lombard General Insurance Company. ...Petitioner.

Vs.

Parasmani Roadlines Pvt. Ltd. ...Respondent.

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Mr.Ravi Kadam, Advocate General, with Mr. Vikram Trivedi, Ms. Nita Gaglani, Mr.Cyres Ardhesir and Ms.Pooja Sood i/b. M/s.Manilal Kher Ambalal & Co. for the Petitioner.

Mr. M.P. S. Rao for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.

14th March 2007.

ORAL JUDGMENT:

The Petitioner is the insurer of a consignment of goods consisting of 10 jumbo bags each containing 900 kg of Carbon Black GPF. The consignment was supplied by Cabot India Limited to J.K. Industries Ltd. in the State of Rajasthan. The goods were transported by the Respondent under a Lorry Receipt dated 7th June 2003. The goods were insured by J.K. Industries Ltd. with the Petitioner under an Insurance Policy of 6th June 2003. By a letter dated 13th June 2003, the insured lodged a claim in the amount of Rs.3,69,363/- for loss and damage caused to the goods in transit. A certificate of damage/shortage was issued on 11th June

2003. An amount of Rs.1,71,439/- was paid by the Petitioner to the insured on 31st July 2003. The Petitioner has been subrogated to the rights and remedies of the insured in accordance with the terms of the policy.

2. A notice under Section 434 of the Companies' Act, 1956 was addressed by the Petitioner to the Company on 26th July 2005 which was followed by a reminder on 28th November 2005. Eventually the Petition for winding up was instituted. An affidavit in reply has been filed by the Company in these proceedings.

3. The submission which has been urged on behalf of the Petitioner is that under the provisions of the Carriers' Act, 1865, the Plaintiff in a suit for loss, damage and non-delivery of goods against a common carrier is not required to prove that such loss, damage or non-delivery was due to the negligence or a criminal act of the carrier, his servants or agents. It was urged that in **Patel Roadways Ltd.vs. Birla Yamaha Ltd.**,¹ the Supreme Court held that the forum constituted under the Consumers Protection Act,

¹ AIR 2000 SC 1461

1986 can entertain a complaint against a carrier of goods, alleging a loss of goods entrusted for transportation. It was submitted that extending the principle that was laid down in **Patel Roadways**, this Court should hold that a Company Petition for winding up under Sections 433 and 434 of the Companies' Act, 1956 would be maintainable.

Section 8 of the Carriers' Act, 1855 provides as follows:

“8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.- Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property (including container, pallet or similar article of transport used to consolidate goods) delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.”

The plain consequence of the provisions of Section 8 is that a common carrier is liable for loss or damage to the property delivered to him for carriage where such loss or damage has arisen

either from (i) a criminal act of the carrier or of his servants or agents; or (ii) the negligence of the carrier or his servants or agents.

4. Section 9 of the Carriers' Act, 1865 however, provides that in such a suit against a common carrier for loss, damage and non-delivery of goods entrusted, it shall not be necessary for the Plaintiff to prove that such loss, damage or non-delivery was on account of the negligence or criminal act of the carrier or of his servants or agents. In **Patel Roadways Ltd. vs. Birla Yamaha Ltd.**,² the Supreme Court, while elucidating the meaning of the provisions of Sections 8 and 9 held that the liability of the common carrier under the Carriers Act is that of an insurer. The effect of Section 9 is that it is not necessary for the Plaintiff to establish negligence. Consequently, the general principle in cases of tortious liability, that a party who alleges negligence against the other must prove the act of negligence, has no application to a case covered by the Carriers Act. Following the judgment in **Patel Roadways, in M/s.Economic Transport Organisation vs.**

² AIR 2000 SC 1461

Dharward Distt. Khadi Gramudyog Sangh,³ the Supreme Court held that it is for the carrier to prove the absence of negligence. In such a case it is for the Defendant to establish that he had taken reasonable care and exercised due diligence in the transportation of the goods.

5. The liability under Section 8 of the Carriers Act, 1865 is conditioned upon the negligence or a criminal act of the carrier, his agent or servant. The Plaintiff in the suit does not have to prove that the loss, damage or non-delivery of goods entrusted was not due to negligence or a criminal act of the carrier. The burden lies on the carrier to establish that he had exercised due diligence and reasonable care in the transportation of the goods. Section 8 provides for the conditions in which liability can be fastened. Section 9 deals with the burden of proof. Section 9 does not detract from the basis on which liability is attracted. The liability under Section 8 would be fasten upon the criminal act of the carrier or where a loss or damage has arisen from his negligence or the negligence of his servants.

3 AIR 2000 SC 1635

6. A Company Petition for winding up under Sections 433 and 434 of the Companies Act, 1956 can be entertained where there is a debt due or in other words, where there is an ascertained liability. A debt is a sum of money which has become payable or which becomes payable in future by a reason of a present obligation. Unless the negligence of the carrier stands established in accordance with the provisions of Sections 8 and 9 of the Carriers Act, 1865, there is no occasion for a debt being due, for there is no ascertained liability. Whether or not negligence has been established is a matter which necessitates adjudication on the basis of evidence recorded at the trial of a Civil Suit. The report of a Surveyor has to be tested on the anvil of evidentiary principles when evidence is adduced in a suit for recovery. The report of the Surveyor does not *ipso facto* establish a debt due and payable. The remedy in winding up is clearly not available when there is a bona fide dispute. The ascertainment of liability and the quantification of damages are issues on which evidence has to be adduced at the trial of a civil suit and a finding of fact has to be

recorded. As the Supreme Court held in **Patel Roadways** (supra) the question can be addressed before the Consumer fora constituted under the Consumer Protection Act, 1986 as well. Those fora do have the power and jurisdiction to resolve matters of fact and render factual determinations. However, unless a debt is due and payable, the remedy of winding up is not available.

7. On behalf of the Petitioner, reliance has been placed on the judgment of a Division Bench of the Karnataka High Court in **Kudremukh Iron Ore Co. Ltd. vs. Rooky Roadways Ltd.**⁴ The decision of the Karnataka High Court is clearly distinguishable for more than one reason. For one thing, in that case, there was absolutely no dispute about the short delivery of a consignment that was entrusted for delivery. The statement of fact shows that the Petitioner, Kudremukh Iron Ore Company had entrusted goods for carriage to the Respondent between the Cities of Bangalore and Mangalore. However, the short delivery of the consignment was brought to the notice of the Company and an acknowledgement was issued by the Company. The Company in

4 1990 (69) Company Cases 178

fact sought the grant of time for making good the short delivery.

This is evident from the following extract of the judgment of the

Division Bench :

“When short delivery of the said materials by the respondent-company was brought to the notice of its managing director, the same was acknowledged by the letter, yet was not made good. The liability of the common carrier arising under section 8 of the Carriers act, 1865 (for short “the Carriers Act”), to the owner of the goods for the undelivered goods, made the respondent-company, a common carrier liable to the Petitioner, the owner of steel materials, for such steel materials, the goods short-delivered. Further, section 9 of the Carriers act enabled the petitioner to bring a suit against the respondent-company to enforce the latter's said liability without the need for it to prove that the short delivery of the steel materials was due to the negligence or criminal act of the respondent-company, its servants or agents.”

That apart, the Division Bench also noted that the matter was uncontested before the Learned Single Judge who had heard the Company Petition ex-parte. There was no response even to the statutory notice for winding up that was issued under the provisions of Sections 434 and 438 of the Companies Act, 1956. The observations of the Karnataka High Court, therefore, must be read in the context of the fact that there was no denial of the liability of

the common carrier in that case. In contrast, the reply that has been filed on behalf of the carrier in the present case does set up a triable issue. The Petition for winding up would in the circumstances be clearly not maintainable.

8. Before concluding, it would be necessary to note that one of the objections of the Respondent was that the claim of the Petitioner is on the basis of subrogation; the Supreme Court has held in **Union of India vs. Sri Sarada Mills Ltd.**,⁵ that subrogation does not confer any independent right on an underwriter to maintain in his own name and without reference to the person assured an action for damage to the thing insured. The right of the assured has been held not to be one of those rights which are incident to the property insured. The action here has been brought independently in the name of the insurance company. However, in view of the conclusion which I have arrived at that the winding up petition is even otherwise not maintainable it is not necessary for this Court to consider the objection any further.

5 AIR 1973 SC 281

9. The Petitioner would be at liberty to pursue its claim in the appropriate forum.

10. The petition is dismissed.

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